

Diamond National Glass Company, a Division of Diamond Worldwide Industries, Inc. and Glaziers, Architectural Metal & Glass Workers Union, Local 636, International Brotherhood of Painters and Allied Trades, AFL-CIO. Case 21-CA-29616

June 30, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND
TRUESDALE

On November 21, 1994, Administrative Law Judge Earldean V.S. Robbins issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Diamond National Glass Company, a Division of Diamond Worldwide Industries, Inc., Paramount, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

“(b) Mail a copy of the notice for posting to Glaziers, Architectural Metal & Glass Workers Union, Local 636, International Brotherhood of Painters and Allied Trades, AFL-CIO.”

2. Substitute the attached notice for that of the administrative law judge.

¹ The judge's recommended Order required the Respondent to cease and desist from its unlawful conduct, post the notice at its facility, and mail a copy of the notice “to each of the picketers who picketed Respondent's premises during the picketing which commenced on July 20 or 21, 1993.” In its exceptions, the Respondent contends that the judge erred in requiring, without explanation, that the notice be mailed to picketers, who are not employees of Respondent, including those who were not present at the Respondent's facility at the time of the unlawful conduct. Although we agree with the judge that under the circumstances of this case it is appropriate to make the notice reasonably available to picketers, we find that individual mail notice to each picketer, and particularly to those not present during the incident found unlawful, is unnecessary to effectuate the policies of the Act. We therefore modify the remedy to require the Respondent to post the notice at its facility and mail a copy of the notice to the Union for posting.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice and mail a copy of this notice for posting to Glaziers, Architectural Metal & Glass Workers Union, Local 636, International Brotherhood of Painters and Allied Trades, AFL-CIO.

WE WILL NOT condone and/or ratify our employees' assault, or attempted assault, of union picketers with company trucks.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

DIAMOND GLASS COMPANY, A DIVISION OF DIAMOND WORLDWIDE INDUSTRIES, INC.

Yvette H. Holliday-Curtis, Esq., for the General Counsel.
Herbert A. Moss, of Santa Ana, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

EARLDEAN V.S. ROBBINS, Administrative Law Judge. This case was heard before me in Los Angeles, California, on April 21, 1994. The charge was filed by Glaziers, Architectural, Metal & Glass Workers Union, Local 636, International Brotherhood of Painters and Allied Trades, AFL-CIO (the Union), on September 13, 1993, and served on Diamond National Glass Company, a Division of Diamond Worldwide Industries, Inc. (Respondent), on September 14, 1993. The complaint, which issued on October 26, 1993, alleges violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The principal issues herein are whether employee Steven Blackwood assaulted and/or attempted to assault union picketers with Respondent's truck; and, if so, whether this action was condoned and/or ratified by Respondent.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the posthearing briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent, a California corporation with an office and place of business in Paramount, California, has been engaged as a glazing contractor in the construction industry. During the 12-month period preceding the issuance of the complaint herein, Respondent, in the course and conduct of its business operations, purchased and received at its Paramount, California facility goods and mate-

rials valued in excess of \$50,000 directly from suppliers located outside the State of California.

The complaint alleges, the parties stipulate, and I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that at all times material herein Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Respondent's facility is located at the top of the curve of a cul-de-sac. Its parking lot is in front of the facility, with two driveways to the street. One driveway leads to the office and one to the warehouse and parking area. There are no sidewalks along the cul-de-sac, but there are 2-hour parking spaces at the 60- to 70-foot-long curb between the driveways (the curb parking space).

Following the October 31, 1992 expiration of its collective-bargaining agreement with Respondent, the Union commenced picketing Respondent's facility during the first week of November 1992, which picketing continued until July 9, 1993,¹ when the Union lost a representation election. The Union commenced picketing again on July 20 or 21 with signs protesting Respondent's refusal to hire two named union glaziers. The parties stipulate that the picketing was lawful. The picket line consisted of several picketers who patrolled, carrying signs, along the curve of the cul-de-sac.

The picketers parked their vehicles at the curb parking space until they were informed by the sheriff that the vehicles would have to be moved every 2 hours. Thereafter they parked elsewhere but placed folding chairs in the curb parking space where they sat when they were not patrolling. In mid-July, after the second picketing began, Respondent began parking at least one of its trucks at the curb parking space.² Prior thereto, Respondent's trucks were parked inside the warehouse at night and in the parking lot during the day. Further, on at least one occasion in mid-July, when one of Respondent's trucks was moved from that space, one of Respondent's employees moved his personal vehicle from the parking lot to the parking space just vacated by Respondent's truck.

On July 28, when picket line captain Ben Arreola arrived at the facility about 5:20 a.m., he reserved space for the picketers by parking his van at the curb parking space. By 6:05 a.m., four other picketers had arrived. At that time, Arreola moved his van and the picketers set up chairs in the vacated parking space. Five or ten minutes later, one of Respondent's trucks driven by Respondent's employee Steve Blackwood began to slowly exit Respondent's facility by the driveway immediately adjacent to where picketers were seated or standing in the curb parking space. It is undisputed that Blackwood asked the picketers to move so he could park

there; and that they refused, stating they were there first. However, what occurred thereafter is disputed.

I credit Arreola and picketer Lynn John Gross as to what occurred. They corroborate each other and are further corroborated by the testimony of Deputy Sheriff Holly Perez as to what she observed when she was dispatched to the scene. I find, in accordance with the testimony of Gross and Arreola, that Blackwood exited the driveway, turned to the left and began inching the truck, at an angle, into the parking space where they were seated. Blackwood continued to inch the truck forward parallel to, and about 2 to 4 feet from, the curb until he ran over the tip of Gross' toe and grazed the back of Arreola's left leg and shoulder with the glass rack mounted on the side of the truck, pushing him one or two feet.³ Blackwood then stopped the truck and went into Respondent's facility. Blackwood denies hitting anyone with the truck or having any intent to do so. He admits, however, that when he stopped the truck, he heard one of the picketers say, "Oh, this guy just ran me over." Another picketer laughed and said, "Yeah, Yeah, call the cops. I'm a witness."

Arreola telephoned the sheriff's department.⁴ When Deputy Perez and another deputy responded to the call, Arreola identified Blackwood as the driver of the truck and showed them the truck, which Perez observed to be parked about 1 inch from two of the chairs and on top of the metal frame of another chair. Arreola reported that the truck struck him in the back and Perez observed a scratch/abrasion injury approximately 12 to 14 inches in length which ran from his knee up the back of his thigh. Gross reported that the truck had run over his toe. When Perez spoke to Blackwood, he said he wanted to move the truck from the parking lot onto the street because the picketers had no right to be there. Blackwood was arrested, however, the district attorney elected not to prosecute.

Blackwood testified that he moved the truck onto the street because a large delivery of glass was expected that day in a 40-foot tractor-trailer rig and space was needed in the parking lot to accommodate the unloading.⁵ The closest available street parking was out of sight, around the corner, and unacceptable because the truck was fully loaded.

Both Blackwood and Respondent's president, Gary Brown, admit that when Blackwood returned inside the facility, Brown inquired what was going on and Blackwood responded that the picketers were accusing him of hitting them. Blackwood specifically testified that he told Brown, "These guys out here are accusing me of hitting them with the truck."⁶ Brown did not respond. Brown admits he made no further attempt to find out what had happened either from Blackwood or the deputy, although he admits observing the deputies speaking to, and arresting, Blackwood. He also testi-

³I do not credit Blackwood's testimony that he parked about 6 to 7 feet from the curb and about 3 feet from the chairs and the picketers.

⁴Blackwood testified that when he returned to the facility, he also called the police.

⁵It is undisputed that, at the time, Respondent's parking lot was not full. Blackwood, however, claims that only two parking spaces were available.

⁶Brown's testimony does not include any mention of the truck, however, he does not specifically deny Blackwood's testimony that he said the picketers were accusing him of hitting them with the truck.

¹Unless otherwise indicated, all dates herein are in 1993.

²Respondent's president, Gary Brown, testified that Respondent has parked trucks at the curb before and from time to time has received parking tickets for doing so.

fied that he has no knowledge as to what actually occurred between Blackwood and the picketers, and that he did not speak to the picketers.

After Blackwood was arrested, but before the deputies left the area, Brown went outside to where the truck was parked. According to Gross and Arreola, he asked them to move so he could park the truck. According to Brown, he did not speak to the picketers, but rather, asked the deputies to tell the picketers to move so he could park the truck. The deputies declined to become involved. The picketers did not move and Brown parked the truck in the parking lot. According to Brown, he moved the truck because it was in the middle of the street. Brown further testified that he is not involved with all deliveries and had no knowledge as to whether a big delivery was expected that day.

There is no contention that Respondent instructed Blackwood to assault the picketers with the truck. However, it is stipulated that it was Respondent's truck and that at the time of the incident, Blackwood was acting in the course of his employment.

B. Conclusions

It is well established that an employer is liable for unfair labor practices committed by a rank-and-file employee who acts as the agent of the employer. In determining agency status, the Board applies common law principles, particularly that of apparent authority and ratification. Whether the specific conduct was actually authorized or subsequently ratified is not controlling. Apparent authority results from a manifestation by the employer to a third party that creates a reasonable basis to believe that the employee's conduct was authorized by the employer. Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such belief. The test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question (alleged agent) was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425 (1987); *Great American Products*, 312 NLRB 962 (1993).

Ratification is "the affirmance by a person of a prior act that did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." Restatement 2d, Agency § 82. Section 83 defines "affirmance" as either (a) a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized, or (b) conduct by him justifiable only if there were such an election. Finally, Section 94 states that [a]n affirmance of an unauthorized transaction can be inferred from a failure to repudiate it." *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988); *Dentech Corp.*, 294 NLRB 924 (1989).

Applying these principles, I find that Respondent is responsible for Blackwood's conduct in assaulting, and attempting to assault,⁷ the picketers with Respondent's truck. Generally, Respondent's trucks had been parked in the warehouse or the parking lot. However, following the picketers

use of the curb parking space, Respondent began parking its trucks in that space. This reasonably created the belief by the picketers that Respondent was trying to prevent them from using the parking space, and that Blackwood's parking of the truck was in implementation of this goal.

Clearly, Blackwood parked the truck in the course of his job duties. His comment to the deputy that he moved the truck into the curb parking space because the picketers had no right to be there indicated that he moved the truck into the curb parking space with the intent to interfere with the picketing activity. Subsequently, Brown not only failed to take any affirmative steps to disassociate Respondent from Blackwood's actions, but made the same request, as had Blackwood, that the picketers move from the parking space. In these circumstances, I find that Brown should have known that his conduct, coupled with the earlier attempts to use Respondent's parked trucks to prevent use of the space by picketers, would likely create the belief that Blackwood acted with Respondent's knowledge and approval. I therefore find that Brown affirmed Blackwood's conduct and that Blackwood had apparent authority to assault and/or attempt to assault the picketers with Respondent's truck. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by Blackwood's assault, and attempted assault, of the picketers.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By condoning and ratifying an employee's assault, and attempted assault, of union picketers with a company truck, Respondent has violated Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Since posting of the notice in the usual places will not reach the picketers, I shall recommend that, in addition to the usual posting, copies of the notice, after being signed by Respondent's authorized representative, be reproduced and mailed to each picketer who picketed Respondent's premises during the picketing which commenced on July 20 or 21, 1993.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Diamond National Glass Company, a Division of Diamond Worldwide Industries, Inc., Paramount, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁷ Although Blackwood actually hit only two of the picketers with the truck, I find that he engaged in an attempted assault of all the picketers stationed at the curb parking space.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Condoning and ratifying its employees' assault, and/or attempted assault, of union picketers with company trucks.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Paramount, California, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) After the aforesaid notices have been signed by an authorized representative of Respondent, copies shall be duplicated and mailed by Respondent to each of the picketers who picketed Respondent premises during the picketing which commenced on July 20 or 21, 1993.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.